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Supreme Court of the United States

OCTOBER TERM, 1949.

No. [redacted]707

JESSE J. PARKERSON, Trustee; MERCHANTS & PLANTERS BANK, a corporation; and HIDUD REALTY CORPORATION, a corporation, *Petitioners,*

v.

WILLIAM R. CHAPMAN, III, and HARRIETT C. PIERIE, Executors and Testamentary Trustees under the Will of William R. Chapman, Jr., Substituted Parties Plaintiff, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Jurisdictional Statement.

The petitioners seek a Writ of Certiorari for the purpose of having this Court review a judgment of the United States Court of Appeals for the Fourth Circuit, entered on January 4, 1950, which affirmed, without dissent, a final judgment of the United States District Court for the Eastern District of Virginia, at Norfolk, in favor of the respondents. They base their claim of jurisdiction in this Court on Title 28, U. S. C. A. 1332.

Statement of the Case.

The case was tried in the District Court by the judge without a jury, the principal issues being: (a) The questions of fact as to whether a deed given by a father to his daughter which was apparently absolute on its face had actually been intended as a conveyance in trust for a particular purpose, the grantor and grantee in that deed being the plaintiffs in the District Court; (b) Whether petitioner Hidud Realty Corporation who had subsequently acquired title to this property took with actual or constructive notice of this trust; (c) Whether a deed of trust note which had been placed upon the property by the grantee in the first mentioned deed was in default at the time when the property was transferred to said Hidud Realty Corporation; (d) Whether petitioners Jesse J. Parkerson, Trustee, and Merchants & Planters Bank had given credit upon the secured note for all monies received by them which were applicable to such credit. Numerous witnesses testified and many exhibits were offered in evidence before the Court by the respective parties upon the issues of fact involved. The Court found the facts specially upon these issues, made written findings of fact and conclusions of law thereon (Rec. 107-116), and entered the judgment complained of.

Argument.

1. The Court Did Not Err in Finding a Trust Under the Virginia Law.

The petitioners, (who were defendants in the court below), complain that the decision appealed from was a misinterpretation of the law of Virginia and did not follow previous decisions of the Supreme Court of Appeals of Virginia. An examination of the record will disclose that the court followed the law of Virginia and the decisions of its highest court, upon the very point complained of. It is conceded by the petitioners (page 10 of their brief) that trusts in land may be created by parol. In fact, the lan-

guage of the petitioners is this, "It is horn-book law in Virginia that you may have a parol trust in real estate * * * ", etc. With this concession, the fact of which is quite true, the only complaint which the petitioners can have in respect of this trust is whether the facts to establish the same were proved. After hearing all of the testimony for and against the existence of this trust and examining all of the exhibits relating to the same, the District Court found the trust to have been established; and, the findings of the Court should not be disturbed except in the absence of any proper proof upon which such findings could be based. F. R. C. P., Rule 52; *Hathaway* v. *First National Bank,* 134 U. S. 494, 33 L. Ed. 1004, 10 Sup. Ct. 608; *Runkle* v. *Burnham,* 153 U. S. 216, 38 L. Ed. 694, 14 Sup. Ct. 837; *McKinley Creek Mining Co.* v. *Alaska United Mining Co.,* 183 U. S. 563, 46 L. Ed. 331, 22 Sup. Ct. 84; *Great A. & P. Tea Co.* v. *Grosjean,* 301 U. S. 412, 81 L. Ed. 1193, 57 Sup. Ct. 772, 112 A. L. R. 293.

Virginia never adopted the Seventh Section of the English Statute of Frauds, nor did it enact a statute equivalent to it. The Supreme Court of Appeals of the state has held in a number of cases that express trusts in land may be created by parol testimony, but that such trusts shall be established by clear and convincing testimony. *Cox* v. *Cox,* 96 Va. 173; *Young* v. *Holland,* 117 Va. 433, 84 S. E. 637; *Straley* v. *Essex,* 117 Va. 136, 83 S. E. 1075; *Daniel* v. *Vidon,* 147 Va. 323, 137 S. E. 526.

The petitioners for certiorari, on page 12 of their brief, refer to a single sentence found in the memorandum opinion of the judge of the District Court, to the effect that since the grantor in the deed referred to alleged and the grantee conceded that the deed was executed for a specific purpose and was in fact for the establishment of a trust, it must be accepted as such so far as those two parties were concerned. However, the petitioners neglected to call this Court's attention to the written findings of fact made in the cause subsequent to the memorandum opinion in which

the court expressly and specially found, "that as between the parties to that deed, that is, Chapman and his daughter, there was an agreement that the conveyance was for the specific purpose of enabling Mrs. Pierie to borrow funds, or establish a credit, in an amount not exceeding $10,000.00, to be secured by a deed of trust upon the property, and as between the said parties the conveyance was not of the fee simple title but was in trust for the purpose stated", (Rec. 107). These findings were sustained by the Court of Appeals (Rec. 162, 163) and should not now be set aside. (Cases hereinbefore cited). The finding of the existence of the trust was supported by the testimony and exhibits. The Court of Appeals in its opinion affirming the judgment of the District Court, sets forth various items of the proof of the trust hereby specifically referred to (Rec. 162, 163).

2. The Deed of Trust Note Was Not in Default.

On the question of whether the deed of trust note under which an attempted foreclosure was made was actually in default, the Court found that there had not been a proper application of all monies that should have been applied to the indebtedness (Rec. 110); and, concluded that there should be an accounting to plaintiff William R. Chapman, Jr., both by defendants Jesse J. Parkerson, Trustee, Merchants and Planters Bank and Hidud Realty Corporation; and a judgment was entered appointing a Special Commissioner for the purpose of this Accounting (Rec. 41).

3. Petitioner Hidud Realty Corporation Was Charged With Notice of the Trust.

On page 15 of petitioners' brief, the following erroneous statement appears: "We earnestly maintain that the only possible notice chargeable to Hidud was contained in the first paragraph of the bill of complaint filed in the Circuit Court of Princess Anne County, Va." Contrary to this statement, proof of actual or constructive notice of the

existence of this trust to petitioner Hidud Realty Corporation is found in the following:

a. Hidud Realty Corporation filed a petition asking leave to purchase the property covered by this deed, in a cause then pending in the Circuit Court of Princess Anne County, Virginia. Neither plaintiff Chapman nor his daughter Harriett Chapman Pierie (formerly Mrs. Forney) was a party to the cause in which such petition was filed. Charles Forney and several of the corporations which he controlled brought the action in the aforementioned State Court in an effort to prevent a foreclosure sale under the deed of trust. The complaint in that cause contained the following recital. "Harriet Chapman Forney is the owner of record of the real property in Princess Anne County, Virginia, described in Exhibit A, filed with this bill of complaint" * * * "she holding the said property under a declaration of trust for the Medical Arts Realty Company of Philadelphia, Pennsylvania." (Rec. 111) (The court found that the Medical Arts Realty Company was owned by Plaintiff William R. Chapman, Jr. (Rec. 115)). The property described in Exhibit A was the land involved in this action (Rec. 111). It was in this very proceeding, containing this recital of the existing trust, that petitioner Hidud Realty Corporation sought by petition and obtained leave to purchase the property (Rec. 112, 113).

b. There was turned over to the attorney and title examiner for Hidud Realty Corporation before it took its title, an instrument purporting to be a deed from Harriet Chapman Forney, her husband Charles Forney joining in, conveying the property to Princess Anne Tobacco Storage Corporation. This instrument was found by the court to have consisted of two pages written at different times and bound together in a manuscript cover with the following language appearing at the top of the second page concealed under the binding of the manuscript cover:

> "This deed is made for the convenience of the parties to clear title, to quit-claim in favor of Princess

Anne Tobacco Storage Corporation under and in trust but in limited power recited, all other rights being in Medical Arts Realty Company." (Rec. 114)

The attorney and title examiner of petitioner Hidud Realty Corporation, had the manuscript cover removed from this mutilated instrument and had it photostated, which photostatic copy contained and fully disclosed the quoted paragraph which had been concealed in the original under the manuscript cover. (Findings of Fact, Rec. 114) The court found other mutilations and changes in this instrument (Rec. 114); and, further found that this mutilated instrument, in such altered form including a substitution of the first page thereof, was, originally, one of three copies of an unrecorded instrument executed in triplicate under date of July 16, 1942, by Harriet Chapman Forney with the approval of her father, William R. Chapman, Jr. (Rec. 114). This instrument, so executed in triplicate contained a recital that the property was subject to a trust in favor of Medical Arts Realty Company (found by the District Court to have been owned by plaintiff William R. Chapman, Jr., Rec. 115). The explicit recitals of the trust, contained in this deed appear on pages 24 and 25 of the record before this court. These are written recitals of a trust signed by the grantee in the deed in question and found and adjudged by the court to have been signed with the approval and advice of her father, William R. Chapman, Jr. (Rec. 114 and 25).

c. There was of record in the appropriate recording office in which the land lay, at the time when Hidud Realty Corporation received its title, an instrument in the form of an assignment of rents from Princess Anne Corporation, to whom the property had been leased by Harriet Chapman Forney, grantee in the said deed, to plaintiff William R. Chapman, Jr., or Medical Arts Realty Corporation "as their interests might appear". This assignment of rents contained a recital that the conveyance of the property by

William R. Chapman, Jr., to his daughter, Mrs. Pierie, was for convenience and in trust. That the property was held for the interest of Chapman or Medical Arts Realty Corporation as their interest might appear (Rec. 109-124).

d. Referring to notice chargeable to Hidud Realty Corporation, the Court of Appeals stated this in its opinion:

> "There can be no doubt that the references to the trust in Chapman's favor, contained not only in the recorded deed of September 20, 1940, from Princess Anne Corporation to Chapman but also in the bill of complaint itself in the foreclosure proceedings under which Hidud claims title were sufficient to put the purchaser on notice, even if we overlook the failure of the attorney for the purchaser to examine the photostat of the mutilated deed wherein the existence of the trust was also disclosed. The bank also had notice it was defendant in the foreclosure suit." (Rec. 163)

It may be observed here that almost four years after the deed was given by Mr. Chapman to his daughter, we find the bank writing to Mr. Chapman about the property, just as though he were the owner (Rec. 129).

On page 16 of Petitioners' brief it is sought to show that plaintiff, William R. Chapman, Jr., who owned the property, had cooperated in the giving of a confirmatory deed to Princess Anne Tobacco Storage Corporation in lieu of the mutilated deed referred to, by referring to one or more telegrams received by Mr. Nusbaum, attorney for Hidud Realty Corporation, bearing a signature, "William R. Chapman"; the record shows that these telegrams were sent by William R. Chapman, III, son of William R. Chapman, Jr., not by plaintiff William R. Chapman, Jr., the latter of whom was ill and declined to give the matter consideration (Rec. 115, Findings of Fact; Testimony of William R. Chapman, III, Rec. 137).

4. Petitioners Parkerson, Trustee, and the Bank Are Charged With Notice of the Trust Before the Sale to Hidud Realty Corporation Was Made.

Petitioners Jesse J. Parkerson, Trustee, and Merchants & Planters Bank, a corporation, are charged with having notice of the existence of this trust prior to the sale of the property to petitioner Hidud Realty Corporation, because the fact of the trust was alleged in the complaint filed in Princess Anne County, Virginia, in which proceeding the sale of the property was made and they admitted the paragraph in which the allegations of such trust were made (Rec. 117, 118).

5. Charles Forney Was Not Chapman's Agent as Alleged in Petitioners' Brief—The Plaintiffs Are Not Estopped to Claim the Relief Granted Them in the Court Below.

The record shows that Mr. Chapman's daughter, now Harriet C. Pierie, and her former husband, Charles Forney, became estranged and were divorced in 1939, after the giving of the trust deed and before the subsequent transactions leading up to the transfer of the property to Hidud Realty Corporation occurred; and, that the bank had knowledge of this broken marital relationship and the fact that Mrs. Forney had returned to Pennsylvania (Rec. 33).

In its memorandum opinion the District Court found that without authorization of Mrs. Forney or her father, Mr. Chapman, and apparently without their being aware of the situation, the bank honored notes of Forney or his corporations for additional funds aggregating the face amount of the collateral note; and, that the loans not being paid, the deed of trust note was declared in default (Rec. 34). The court further held that neither Mrs. Forney nor Mr. Chapman were estopped to call upon the trustee under the deed of trust for an accounting, and that plaintiff William R. Chapman was the person in interest and that the trustee and bank should account to him for the funds received from insurance and rents (Rec. 33-34)

Neither was defendant Forney agent for Mr. Chapman or his daughter in co-operating in disposing of the property to Hidud Realty Corporation. This was for his own benefit or the benefit of his corporations and without the knowledge or consent of Mr. Chapman or his daughter, the former Mrs. Forney.

Conclusion.

In conclusion it is respectfully stated that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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